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IN THE

Supreme Court of the United States

October Term, 1946 — No. 527

LORRAINE COFFEE COMPANY, INC., AND
ERIC EBEN,

Petitioners,

against

LA TOURAIN COFFEE CO., INC.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT AND
BRIEF IN SUPPORT OF PETITION**

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	PAGE
FOURTH —The one word “Lorraine” and the words “La Touraine” are not <i>idem sonans</i>	19
FIFTH —The learned Circuit Court, by its reversal, has virtually set aside the District Court’s Finding of Fact Ninth, (Record page 115) without hold- ing such finding “clearly erroneous”	19-20
SIXTH —It is respectfully prayed that the petition for a Writ of Certiorari to the Circuit Court of Ap- peals for the Second Circuit be granted	20

AUTHORITIES

American Wine Co. v. Kohlman, 158 Fed. 830	12
Apollo Bros. v. Perkins, 208 Fed. 530	12
Aunt Jemima Mills Co. v. Rigney, 247 Fed. 407	18
Barton v. Rex Oil Co., 2 Fed. 2nd 432	14
Bihn v. United States, (unreported, decided June 10, 1946)	5
Block v. Jung Arch Brace Co., 300 Fed. 11	18
Bollenbach v. United States, 326 U. S. 604	6
British-Amer. Tob. Co. v. British Amer. Cigar Stores, 206 Fed. 189	12
Butterfield & Co. v. Abraham & Straus, 212 N. Y. App. Div. 384; aff’d 241 N. Y. 560	12
Cohen’s Trademark, In re, 39 Rep. Pat. Cas. 33	10
Columbia Mill Co. v. Alcorn, 150 U. S. 460	6, 12
Commercial Advertiser Ass’n. v. Haynes, 26 N. Y. App Div. 279	18
Crescent Typewriter Supply Co., In re, 30 App. D. C. 324	12
Computing Scale Co. v. Standard C. Scale Co., 118 Fed. 965	18

Index

iii

PAGE

Elgin Natl. Watch Co. v. Illinois Watch Case Co., 179 U. S. 665	6, 12
E. McIlhenny's Sons v. Trappey, 278 Fed. 582	12
Encyclopedia Americana	12
Ex Parte The Laxa Cola Co., 100 Off. Gaz. 451	10
Federal Rule Civil Procedure	6, 19
Fitchette's Ltd. v. Loubet & Co., 36 R. P. C. 296	19
Folmer Graflex Corp. v. Graphic Photo Serv., 44 Fed. Supp. 429	12
French Republic Co. v. Saratoga Vichy Co., 191 U. S. 427	6, 7
Goodwin v. Ivory Soap Co., 18 R. P. C. 389	19
Hanover Star Milling Co. v. Metcalf, 240 U. S. 403	7
Kellogg v. National Biscuit Co., 305 U. S. 111	7
Kotteakos v. United States, (unreported, decided June 10, 1946)	6
Kraft-Phenix Cheese Corp., 120 Fed. (2nd) 391	6
Landspriv v. Hall, 36 App. D. C. 532	10
Laxakola Co., The, 100 Off. Gaz. 451	10
Le Blume Import Co. v. Coty, 293 Fed. 344	13
McIlhenny's Sons v. Trappey, 278 Fed. 582	12
Morgan Env. Co. v. Walton, 86 Fed. 605	12
Munro v. Towsey, 129 N. Y. 38	11
Nims, Unfair Competition & Trademarks	13, 18
Potter Drug Co. v. Pasfield Soap Co., 102 Fed. 490	18

	PAGE
Scandinavia B. Co. v. Asbestos & R. Works, 257 Fed. 937	14
United Drug Co. v. Rectanus Co., 248 U. S. 90.....	7
Vogue Co. v. Thompson Co., 300 Fed. 509	18
Ward Baking Co. v. Potter-Wrightington, 293 Fed. 398	18
Waterbury Chem. Co. v. Reed & Carnick, 41 App. D. C. 256	10
Weiler v. United States, 323 U. S. 606	6

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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Petitioners, LORRAINE COFFEE COMPANY, INC. and ERIC EBEN, respectfully present that a writ of certiorari issue to review the final decision of the United States Circuit Court of Appeals for the Second Circuit, entered on the 26th day of August, 1946, reversing a judgment of the District Court of the United States for the Eastern District of New York, which dismissed a bill of complaint of the respondent in a suit for injunctive relief and for an accounting of profits, on account of an alleged infringement of trade make and unfair competition.

Opinions Below

There were two opinions from the Circuit Court of Appeals for the Second Circuit, the prevailing opinion for reversal of the judgment, the dissenting opinion for its affirmance. In the District Court of the United States for the Eastern District of New York there was one opinion by Judge Inch sitting at Civil Non-Jury Term. None of said opinions has been reported but will be found in the record herein, the two opinions of the Circuit Court of Appeals at Appendix A to the record and that of the District Court at pages 110-113 of such record.

Basis for Jurisdiction

It is competent for this Court to require by certiorari that the case be certified to it for review pursuant to the act of February 13, 1925, chapter 229, section 1, 43 stat. 938, amending and reenacting section 240A of the Judicial Code, 28 U. S. C. A., Section 347, and Rule 38 of the Rules of this Court.

Questions Presented

Does the use by petitioner, Lorraine Coffee Company, Inc., a New York corporation, of the name "Lorraine" in the sale by it of coffee, tea and cocoa products, to small restaurants and diners in Staten Island, New York, and northern New Jersey, infringe respondent's (a Massachusetts corporation) registered trade mark "La Tou-raine" in the sale by the latter of the same products, the greater part of which latter sales are to large corporations, railroads and steamship companies principally limited by the New England area?

Is petitioner-corporation guilty of unfair competition with the respondent in such use?

Statute Involved

The statute involved herein is the Trade Mark Act of 1905 (U. S. C. A., Titl. Sec. 85(b)).

Summary Statement of Matters Involved

This is an infringement case. Respondent has procured the registration of the words "La Touraine" with the United States Patent Office for coffee, tea and cocoa products. It is a Massachusetts corporation and has been engaged in the coffee, tea and cocoa business or one or more of such for many years.

Its main activities are confined to the area of the New England states and consist of the sale in large quantities at wholesale of its products to hotels, railroad and steamship companies, large restaurants, and in some instances to smaller restaurants. There have been some sales in the area of metropolitan New York City.

Petitioner is a corporation of the State of New York having been incorporated in the year 1944 and sells its products of coffee, tea and cocoa to small restaurants in Staten Island, N. Y., and northern New Jersey.

The respondent contends that the use by petitioner of the word "Lorraine" infringes upon its registered trade mark and that its use is likely to cause confusion among the respective trades; that the two names are similar and resemble each other in sound and sight, and create a situation where the public is likely to be deceived.

Petitioner on the other hand urges that the registered mark is geographical merely—being a French province—and that, as a consequence, its use cannot be exclusively appropriated by anyone, or such a right thereto claimed without the existence and proof of a secondary meaning of such mark in the mind of the purchasing public; that

there is no similarity of sound between the mark of the respondent and the name of petitioner Lorraine Coffee Company, Inc. and that as the exact mark "La Touraine" has not been appropriated by petitioner corporation, there is no infringement and consequently no unfair competition.

The District Court of the United States for the Eastern District of New York (Inch, J.) held that there was no infringement between the mark and the petitioner's name, no unfair competition, that no secondary meaning had been shown to have attached to respondent's mark; and as a consequence the District Court dismissed the bill of complaint.

Upon appeal from the judgment of dismissal, the United States Circuit Court of Appeals for the Second Circuit (Chase, Clark and Frank, Circuit judges) by a divided court reversed the District Court and remanded the action for the award of infringement relief, Chase and Clark, JJ., voting for the reversal with an opinion by Clark, C. J., while Frank, C. J., dissented with opinion.

Errors to be Urged

The Court below erred:

1. In reversing the judgment of the District Court and remanding the case for the award of infringement relief.
2. In holding that the words "La Touraine" are not geographical and hence are susceptible of registration under the Trade Mark Act of 1905.
3. In holding that the word "Touraine" itself is no longer a geographical name.
4. In holding that "La Touraine" is an entirely arbitrary name.

5. In holding that the mark "La Touraine" and the name "Lorraine" are so similar as to make likely the deception of an appreciable number of ordinarily prudent customers.
6. In basing its decision upon the provisions of the new Trade Mark Act of July 5, 1946 (Pub. L. No. 489, C. 540, 79th Cong., 2nd Sess., Sec. 2(e)(2), 15 U. S. C. A., Sec. , not in effect at the time of the decision but only to become effective in July of 1947 (*Idem*, Sec. 46(a)).
7. In disregarding Federal Rule of Civil Practice No. 52A in deciding counter to Finding of Fact Number Ninth without holding such Finding "clearly erroneous" under said rule.
8. In finding that the trade mark "La Touraine" was arbitrary, fanciful and not "merely geographical" under 15 U. S. C. A., Sec. 83(b).
9. In failing to hold that there was no infringement of respondent's trade mark and no unfair competition by petitioner as against respondent.

Reasons Relied on for Allowance of Writ

1. The United States Circuit Court of Appeals for the Second Circuit has by its decision disavowed the important Findings of Fact made by the trial judge who was confronted with the witnesses. This Court has recently several times admonished the Circuit Court of Appeals not to assert its own view of the facts on the basis of a mere printed record.

Bihn v. United States (not yet reported, decided June 10, 1946)

Kotteakos v. United States (not yet reported, decided June 10, 1946);
Bollenbach v. United States, 326 U. S. 604; *Weiler v. United States*, 323 U. S. 606-611.

Federal Rule of Civil Practice 52(a) provides

"Findings of Facts shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The Trial Court found in its Ninth Finding that petitioner acted in good faith in adopting the name "Lorraine" and had not heard of respondent's name or mark "La Touraine" and was innocent of any intent to benefit by the good will and reputation of respondent.

The decision of the United States Circuit Court of Appeals for the Second Circuit, the review of which is herein prayed, utterly disregarded this rule 52(a) and erroneously found the petitioner Eben as having attempted a "flight of fancy" and that his selection of the name "Lorraine" was not in good faith, and his attempted explanation of the reasons for his selection of the name, somewhat "naive", for which there is no basis or semblance of foundation.

The Circuit Court of Appeals for the Second Circuit adopted the argument made below by the respondent that a name is not merely geographical if it is employed as a symbol for a product not manufactured, grown or processed in the named geographical area; which holding is in direct conflict with the decision in *re Kraft-Phenix Cheese Corp.*, 120 Fed. (2d) 391.

The decision below is also in conflict with the holdings by this Court in *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *French Republic Co. v. Saratoga*

Vichy Co., 191 U. S. 427, *Kellogg v. National Biscuit Co.*, 305 U. S. 111.

The decision below also is in conflict with *United Drug Co. v. Rectanus Co.*, 248 U. S. 90; *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, holding that it is not enough for an aggrieved trade mark owner, in order to give him a monopoly in one area, to establish a secondary meaning in his trade mark in an area adjacent to that in which he claims infringement; since the mark "means one thing in one market, and an entirely different thing in another" (*United Drug Co. v. Rectanus Co.*, *supra*).

2. These conflicting decisions involve an important question of trade mark scope relating to the administration of the federal statute dealing with trade marks, particularly as to the extent to which the Courts should go in fixing a judge-made monopoly on symbols or marks that are in the main *publici juris*, because of their geographical characteristic as well as because of the fact that they have assumed no secondary meaning in the public mind that effectively disassociates them from the geographical tenor and changes them into an arbitrary, fanciful symbol.

3. As the obvious conflict and the importance of the question involved so clearly demonstrate the necessity for a review by this Court of the decision below, petitioners have not attempted in this petition to set forth at length their contentions on the merits of the controversy. The position of petitioners is stated at some length in the dissenting opinion of Circuit Judge Frank appearing in Appendix A of the record.

Conclusion

It is respectfully submitted that a writ of certiorari issue from this Court to review the decision of the United States Circuit Court of Appeals for the Second Circuit.

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**BRIEF OF PETITIONERS IN SUPPORT OF PETI-
TION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT**

FIRST

The trademark "La Touraine" has not been appropriated by defendants. Hence this suit, *qua* infringement, cannot prevail.

Defendants use the name "Lorraine" after Alsace-Lorraine and after the name of a daughter of a former business associate of defendant Eben's (Rec. 68). So that, when we view this suit in the light of infringement, it is obvious that there is no basis for a claim of appropriation of plaintiff's trademark as such.

There is nothing unique about the words "LA TOUR-AINE". It is no fetish. It cannot be said to have been "invented" by plaintiff or its predecessors. Even if it be assumed—which we by no means concede—that a secondary meaning has attached to the trade-name, it relates solely to the nature of plaintiff's product and not to plaintiff's manufacture exclusively.

Even the Trademark Act of 1905 is careful to limit the restriction on registrations of words "identical" with one already registered (Sec. 5-b). And the use of that word "identical" in the Act is significant; the Act could have as readily used the word "similar".

The cases relied on by plaintiff all, or most, center around fancied, unique names, *e. g.*, "SPUNLOW" vice "SUNGLOW"; "KEEPCLEAN" vice "STA-CLEAN"; "RAMOPA"—"MAROPA"; "TANGEE"—"ZANDE"; "CUTEX"—"CUTICLEAN".

But to contend that "LORRAINE" infringes "LA TOUR-AINE" because of *idem sonans* is as logical as to contend that a railway ticket seller, when asked for passage to Lorraine, would be likely to sell, mistakenly, a ticket for La Touraine. The improbability is obvious; nonetheless, the simile is apt, as both Lorraine and La Touraine are geographical.

There are many instances of like purport, where infringement has been denied. "Pinozyme"—"Peptenzyme" (*Waterbury Chem. Co. v. Reed & Carnick*, 41 App. D. C. 256); "Kalodont" was held not likely to be confused with "Sozodont" (*Landspriv v. Hall*, 36 App. D. C. 532); "Dermacure" was held not to conflict with "Derma-kola" (*Ex Parte The Laxakola Co.*, 100 Off. Gaz. 451); "Sozodont" not in conflict with "Zodenta" (

v. , 28 App. D. C. 454); "Aquatum" was held to be not deceptively similar to "Aquatite" (*Re Cohen's Trademark*, 39 Rep. Pat. Cas. 33). Each case must be decided as one of first impression.

As said by the New York Court of Appeals in an early injunction case,

"A court of equity should proceed in the exercise of its power with a wise and judicial discretion. In cases such as this, it should presume that the public makes use of the senses of sight and hearing, and that it is possessed of a sufficient amount of intelligence to note the differences the senses convey. The court ought not to interfere with the freedom of conduct of trade and with general business competition. Its power to restrain should be reserved to prevent fraud and imposture from some real resemblance in the name and appearance of the publications."

Munro v. Towsey, 129 N. Y. 38, 43.

SECOND

The term "La Touraine" being geographical merely, no proprietary right in, or exclusive use of, it exists in plaintiff, since no secondary meaning thereof is shown to have attached.

There are in New York City alone the following uses of plaintiff's registered words:

"La Touraine Apartments", 50 Morningside Drive, Manhattan;

"La Touraine Restaurant", 8500—4th Avenue, Brooklyn;

"Touraine Hotel", opposite United States Court House, Brooklyn.

In addition, in Boston is the Touraine Hotel, 62 Boyle Street; and as plaintiff in this case is a Boston concern,

there is something significant in its selection of the term "LA TOURAINE", particularly as plaintiff's packages have on them

"Hotel
La Touraine
Coffee".

Plaintiff's trademark, "La Touraine", being a geographical name (Touraine—a province in France, Encyclopedia Americana, 1941 Edn., Vol. 26, "Touraine"), its use cannot be monopolized.

E. McIlhenny's Sons v. Trappey, 278 Fed. 582;
Folmer Grafex Corp. v. Graphic Photo Serv.,
44 Fed. Supp. 429.

And the prefixing of the article "La" in no measure detracts from its non-infringeability. (*Cf.* "The Bronx".)

In the *McIlhenny* case, the word "Tabasco" was held to be non-infringeable as it was geographical, viz., one of the states of Mexico. (*Cf.* Encycl. Americana, 1941 Edn., Vol. 26, "Tabasco".)

The word "Normandy" was denied registration because geographical (*Butterfield & Co. v. Abraham & Strauss*, 212 N. Y. App. Div. 384, aff'd 241 N. Y. 560); similarly "Elgin" as applied to watches (*Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665); "British-America" as applied to cigar stores (*British-American Tobacco Co. v. British-American Cigar Stores*, 206 Fed. 189); "Columbia" as applied to flour (*Columbia Mill Co. v. Alcorn*, 150 U. S. 460); "American" as applied to wines (*American Wine Co. v. Kohlman*, 158 Fed. 830); "Columbia" as applied to tissue and toilet paper (*Morgan Envelope Co. v. Walton*, 86 Fed. 605); "Orient" as applied to ink ribbons and carbon papers (*Re Crescent Typewriter Supply Co.*, 30 App. D. C. 324); "Nubia" likewise was denied registration (*Apollo Bros. v. Perkins*, 208 Fed. 530).

"Marks consisting merely of geographical terms are not registrable under the Act. These terms include not only names of cities, countries or subdivisions of countries, but also words which apply to a particular section of the globe."

Nims, Unfair Competition and Trademarks, page 634.

Nor is there shown that a secondary meaning has attached to the words "La Touraine". We can well see how the public mind has come to associate a fancied, arbitrary word with a particular manufacturer, *e. g.* "Listerine", "Kotex", "Tangee", "Coca-Cola", "Moxie", etc., but the words "La Touraine" are *publici juris*, are in common use, not only in a geographical sense, but, as shown above, by restaurants, hotels, a coffee company and an apartment house. In *Le Blume Import Co. v. Coty* (2nd Cir.), 293 Fed. 344, the Court said, pages 358, 359:

"We do not at all question that words which are in general or common use and which are merely descriptive, are *publici juris* and cannot be appropriated as a trade-mark. That is elementary law, which no one thinks of questioning."

In that case, to be sure, the Circuit Court of Appeals for the Second Circuit held that "L'Origan" was infringed by "Origan". But it is obvious that there are two reasons for the Court so holding, one that the *very word* was adopted (not in the case at bar), and the other that (to quote the language of the Court in that case):

"(it) is unintelligible and non-descriptive to the general public, although it may be known to linguists and scientists, may properly be regarded as arbitrary and fanciful * * *"

(also not in the case at bar).

The absence of any evidence to the effect that the public mind has come to associate the words "La Touraine" with the plaintiff company is sufficient to defeat this suit, there being no originality, no oddity, in the words themselves.

"The test of secondary meaning is whether the trade-mark has become broadly known to the public as denoting a product of certain origin. Therefore, in looking for a secondary meaning this court is controlled by the *fact* that such a meaning has been acquired in the mind of the public rather than by the time it has taken for that fact to be established."

Barton v. Rex Oil Co., 2 Fed. 2nd 432.

And that is precisely the situation in the case at bar. There is not shown the existence of a secondary meaning; and the packages of defendant corporation (as we shall show *infra*) are careful to avoid any likelihood of confusion, both as to form, color of the wrapper, as to the design, emblem and script, as well as plainly indicating on the wrapper that defendant's coffee is manufactured by the petitioner and not by the respondent.

In *Scandinavia B. Co. v. Asbestos & R. Works*, 257 Fed. 937 (Second Circuit), the Court said:

"The fact that the geographical term has come to have a secondary meaning does not * * * constitute a valid trademark at common law * * * unless (it) has been selected, used and appropriated under such special circumstances as to point distinctly to origin and ownership."

The language of New York Supreme Court Justice McAvoy in an infringement and unfair competition case is applicable here. In *Butterfield & Co., Inc. v. Abraham*

& Strauss, Inc., 212 A. D. 384 (aff'd 241 N. Y. 560), the Appellate Division of the Supreme Court of the State of New York unanimously reversed the lower court which had granted a judgment for plaintiff restraining defendant from using the word "NORMANDY" in connection with voile. In that case, plaintiff had not registered the name as a trademark, but claimed a common law trademark. (This phase is not of particular moment here, however, as the Trade-Mark Act of 1905 is but declaratory of the common law, and any adjudication under the latter as to infringement, equally applies to the former). Judge McAvoy said (p. 386):

"There was no testimony offered by plaintiff on the trial by any manufacturer, retail dealer, dressmaker, salesperson, buyer of goods or any other person who would be expected to know of the fact, to show that in May, 1923, the name 'Normandy' was known to the buying public in general or even among dress manufacturers and dealers, as the name of a fabric manufactured by plaintiff exclusively."

Nor was there any such testimony in the case at bar.

To be consistent, plaintiff must claim and show that the words "La Touraine" have become associated in the public mind with, *not* the *product* of plaintiff, but with the plaintiff company. If the public mind does not so associate, then all the more the public mind will not be confused with the word "Lorraine". For the association must be fixed indelibly and, if so, the public mind will, in turn, disassociate, exclude, any other name. Judge McAvoy continued (p. 387):

"We do not think that the word 'Normandy' can be exclusively appropriated as a common-law trademark. The fact that it is a geographical term prevents such appropriation. Even though it may have

acquired a secondary meaning in connection with plaintiff's fabric, this does not constitute it a valid trademark at common law. In any case in which a geographical term is used and an appropriation of that term made to an article manufactured or sold by a party, relief against a person using such name to the detriment of another, *must be afforded not on the ground of trademark, but upon that of unfair competition* * * * and since the secondary meaning found related to the *nature of the product, and not to plaintiff's manufacture* exclusively, the action could not be maintained upon the theory that a secondary meaning had been acquired through the use of that name, and that this would be an infringement of its use by defendant." (Emphasis supplied.)

"* * * There is no common law trademark possible in the use of the word 'Normandy' by reason of its lack of inherent application to particular styles of goods as exclusive in manufacture or description, because of its geographical nature. *Although not political, the name is now descriptive of a recognized locality.*" (Emphasis supplied.)

And it must be borne in mind that in that case the defendant seized upon the *actual word*, while in the case at bar there is no such identical seizure. *A fortiori*, in the instant case, there can be no infringement

THIRD

No likelihood of confusion or any actual confusion is shown by plaintiff. Indeed, there is no warrant for a fear of confusion. Consequently, this suit, *qua* unfair competition, must be dismissed.

There are so many strikingly dissimilar features between plaintiff's trademark and the word "Lorraine" used by defendant corporation, that we are constrained to point them out as belying any possible likelihood of confusion even in the unwary (see Exhs. 9, 26; Rec., pp. 125, 129). Thus:

LA TOURAINE	LORRAINE
Two separate words	One word
Two capital letters	One capital letter
Ten letters	Eight letters
A trisyllable	A disyllable
Geographical name in France	Proper name
Second letter is "a"	Second letter is "o"
<i>Insignia</i> —cup of smoking coffee	Coffee bean
<i>Color of bag</i> —beige	light tan, near yellow
<i>Lettering</i> —white—print	brown—script
<i>Labels</i> :	"Lorraine Coffee"
"Hotel La Touraine Coffee" (Three lines)	(two lines)

Under the tests not only of visual comparison, but of memory comparison as well (*Nims, Unfair Competition and Trademarks*, pp. 844, 845), there can be no confusion. There is not the slightest approach to similarity between the two containers of petitioner and respondent.

The following rival trade names were held not so similar as to be likely to cause confusion in the public, and that, hence, there was no infringement: "Cuticura"—"Cuticle" (*Potter Drug Co. v. Pasfield Soap Co.*, 102 Fed. 490); "Standard Scales"—"Standard Computing Scales" (*Computing Scale Co. v. Standard Computing Scale Co.*, 118 Fed. 965); "Commercial Advertiser"—"New York Commercial" (*Commercial Advertiser Assn. v Haynes*, 26 N. Y. App. Div. 279).

In these injunction cases, the trend of decision is to place less emphasis on competition and more on confusion, the Courts holding that the test is whether the public is likely to be deceived.

Vogue Co. v. Thompson Co., 300 Fed. 509;
Aunt Jemima Mills Co. v. Rigney, 247 Fed. 407;
Ward Baking Co. v. Potter-Wrightington, 293 Fed. 398.

In *Block v. Jung Arch Brace Co.*, 300 Fed. 11, the Court said:

"* * * we are not aware of any authority which justifies finding infringement of a technical trademark from such analogy or identity alone, unaccompanied by substantial similarity in appearance, display or sound, and we are not satisfied that any principle justifies the extension of the rule to such a case."

FOURTH

The one word "Lorraine" and the words "La Touraine" are not *idem sonans*.

In *Goodwin v. Ivory Soap Co.*, 18 R. P. C. 389, the word "Ivy" was held not infringed by the word "Ivory". It was there said (p. 392) :

"Simply because the word 'Ivy' may have some sort of similar sound to the word 'Ivory', if you do not pronounce the word 'Ivy' properly, the plaintiff asks the court to assume as the inevitable deduction, that what the defendants are doing must be calculated to deceive. It is impossible to my mind to make any such deduction from the facts."

In *Fitchette's, Ltd. v. Loubet & Co.*, 36 R. P. C. (Ch. Div. 296), plaintiffs used as trademarks "LITO" and "Y-TO". A suit for an injunction restraining the use of the word "RITO" was dismissed on the ground that the latter was not *idem sonans* with the former.

FIFTH

The learned Circuit Court, by its reversal, has virtually set aside the District Court's Finding of Fact Ninth, (Record, page 115), without holding such finding "clearly erroneous."

Federal Rule of Civil Procedure No. 52 (a) provides that

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The prevailing opinion, page 1986, clearly sets aside the Finding of Fact, NINTH, of the good faith and innocence of defendant Eric Eben in adopting the name "LORRAINE". But nowhere is that finding held to be "clearly erroneous."

SIXTH

It is respectfully prayed that the petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit be granted.

Respectfully submitted,

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